No. 87-615

In The

Supreme Court of the United States

OCTOBER TERM, 1987

MELISSA DESTEL, an infant by her mother and next friend, MARY JO DETSEL,

Petitioner,

vs.

BOARD OF EDUCATION OF THE AUBURN ENLARGED CITY SCHOOL DISTRICT, PETER KACHRIS, individually and as Superintendent of the Auburn Enlarged City School District, GORDON AMBACH, Commissioner of the New York State Education Department,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the respondents are not required, under the Education for All Handicapped Children Act, to provide petitioner with constant, life-sustaining, therapeutic care while she attends school.

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Respondents, Board of Education of the Auburn Enlarged City School District ("School District") and Peter Kachris, respectfully pray that the Court deny the petition for writ of certiorari to review the decision of the United States Court of Appeals

for the Second Circuit. That decision affirmed the order of the United States District Court for the Northern District of New York granting respondents' summary judgment and dismissing petitioner's complaint.

COUNTERSTATEMENT OF THE CASE

This case involves the propriety of the School District's determination that it is not obliged under the Education for All Handicapped Children Act, 20 U.S.C. §1401 *et seq.* ("EAHCA"), to provide myriad life-sustaining, therapeutic medical services to a young multiply handicapped girl. Both the United States District Court for the Northern District of New York and the United States Court of Appeals for the Second Circuit have concluded that the School District has no such obligation.

1. *Statement of Facts*

The petitioner, Melissa Detsel ("Melissa"), is a severely handicapped child whose multitude of complex medical problems require constant life-sustaining care of a sophisticated nature.[1] Since 1983, she has attended a class for multiply handicapped children at an elementary school in the School District. During this time, a licensed practical nurse has been constantly attending to Melissa's extraordinary medical needs. This skilled health professional must be with Melissa virtually every moment that she is in school. It is imperative that this nurse be continuously ready and able to respond immediately should Melissa experience respiratory or congestive heart failure. Additionally, this profes-

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[1] Melissa's extensive medical problems include pulmonary hypertension, borderline congestive heart failure, pulmonary fibrosis with ventilator dependency, scoliosis, club feet, gastroesophageal reflux and chronic undernutrition.

sional must regularly suction Melissa's lungs, administer medication through Melissa's jejunum tube, and continuously supply her with oxygen.

Quite plainly, the care which Melissa's condition requires cannot be provided by anyone except a trained, experienced health-care professional. Her numerous and complicated medical needs simply cannot be met by a school nurse who must care for many other students, a point which both Melissa's nurse and pediatrician concede.

Until Melissa entered school in 1983, her medical care was paid for by the New York State Department of Social Services ("DSS"). Once she started school, however, DSS abruptly and inexplicably refused to continue this practice.[2] The School District also refused to pay for petitioner's medical care, but, while this action is pending, has been paying for that care under protest.

2. *Proceedings Before the District Court and the Court of Appeals*

On the foregoing facts, the United States District Court for the Northern District of New York (Hon. Neal J. McCurn) carefully reviewed and applied this Court's decision in *Irving Independent School District v. Tatro,* 468 U.S. 883 (1984) ("Tatro") and granted the respondents' motion for summary judgment dismissing the petitioner's complaint, including her claim that respondents' refusal to provide her with constant nursing care violated

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[2] Petitioner has neglected to mention that there is an action pending against the DSS in the United States District Court for the Northern District of New York by which she seeks to hold DSS financially responsible for her medical services during school hours.

the EAHCA.[3] (Appendix to Petition, pp. 3a-13a). In a *per curiam* opinion, the United States Court of Appeals for the Second Circuit concluded that "the complaint was properly dismissed for the reasons stated in the opinion of the district court."[4] (Appendix to Petition, pp. 1a-2a).

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' DECISION THAT THE EAHCA DOES NOT REQUIRE THE SCHOOL DISTRICT TO PROVIDE PETITIONER WITH CONSTANT, LIFE-SUSTAINING THERAPEUTIC CARE WHILE SHE ATTENDS SCHOOL IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISIONS IN *ROWLEY* AND *TATRO*.

This Court twice has considered the duty to provide handicapped children with a "free appropriate public education" under the EAHCA. In *Board of Education v. Rowley,* 458 U.S. 176 (1982), the Court decided that a school district was not required to provide a deaf student with a qualified sign-language interpreter in all her academic classes as part of a free appropriate public education. Rejecting the argument that the EAHCA requires participating school districts to "maximize the potential

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[3] Petitioner's complaint also asserted claims based upon alleged violations of Section 504 of the Rehabilitation Act, the Civil Rights Act of 1871, the Fourteenth Amendment of the United States Constitution and Article 89 of the New York Education Law. The petition for writ of certiorari does not dispute the dismissal of these claims.

[4] Quite disingenuously, petitioner has suggested that the court of appeals rendered its decision without considering *Tatro* (*See* Petition for Writ of Certiorai, p. 7). This is completely inaccurate. The court of appeals based its affirmance on the district court's opinion which includes an exhaustive and careful analysis of this Court's decisions in both *Board of Education v. Rowley,* 458 U.S. 176 (1982), and *Tatro, supra.*

of handicapped children," the Court held that a school district satisfies its duties under the EAHCA when it provides handicapped children with personalized instruction and sufficient support services to permit them to benefit educationally from that instruction. *Rowley,* 458 U.S. at 190, 204.

More recently, the Court, in *Irving Independent School District v. Tatro,* 468 U.S. 883 (1984), considered whether clean intermittent catheterization ("CIC") qualified as a related service which must be provided handicapped children as part of a free appropriate public education. CIC involves the insertion of a catheter into the urethra every three or four hours to drain the bladder and avoid injury to the kidneys. 468 U.S. at 885. It is a simple procedure that may be performed in a few minutes by a layperson. *Id.* Indeed, with "less than an hour's training" an individual can become proficient enough to administer CIC. *Id.* Emphasizing that CIC was not more burdensome than services provided nonhandicapped students by a school nurse, the Court concluded that it was a "related service" which the school district was obligated to provide under the EAHCA. 468 U.S. at 893-895.

Applying the principles which this Court enunciated in *Rowley* and *Tatro*, the district court concluded, and the court of appeals agreed, that the constant professional care that Melissa requires is not a "related service" which must be provided under the EAHCA as part of a "free appropriate public education." Melissa requires continuous, not intermittent, care. The failure to monitor her condition continuously would jeopardize her life. Moreover, a school nurse, who is responsible for the health needs of other students, cannot provide her with the incessant and exclusive vigilance which Melissa's extensive physical problems demand. Indisputably, Melissa's complicated medical care cannot be provided by a trained layperson; only an experienced, licensed professional is capable of meeting Melissa's critical needs. On these facts, the district court and the court of appeals correctly

determined that the EAHCA does not require the School District to provide Melissa with a personal nurse to provide the constant medical attention she requires.

Petitioner's assertion that the Second Circuit's decision undermines the statutory "mandate" to educate petitioner with children who are not handicapped is meritless. It is sheer speculation to assume that petitioner will not secure another source of funding to pay for the medical care which she requires, particularly when her action to compel DSS to pay for these services is still pending. More importantly, the EAHCA contemplates that regular classrooms may not be a suitable setting for educating many handicapped children. Although the EAHCA articulates a preference for mainstreaming handicapped children, "[t]he Act expressly acknowledges that 'the nature or severity of the handicap [may be] such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily.' " *Board of Education v. Rowley,* 458 U.S. at 181 n.4. Thus, assuming that Melissa will, in the future, be educated in her home, it is clear that the School District nevertheless will satisfy its obligation to provide her with a "free appropriate public education" by offering her "personalized instruction and sufficient support services to permit her to benefit educationally from that instruction." *Board of Education v. Rowley,* 458 U.S. at 203. In these circumstances, it is clear that the district court and the court of appeals reached the correct albeit difficult decision.

II. THE "APPARENT CONFLICT" WHICH PURPORTEDLY EXISTS BETWEEN THE DECISIONS OF THE SECOND AND NINTH CIRCUITS IS ILLUSORY AND PREDICATED UPON PETITIONER'S DISTORTED READING OF THOSE DECISIONS.

The Second Circuit concluded its *per curiam* opinion, which affirmed both the reasoning and the conclusion of the district court, by observing that "the district court gave proper effect to the statutory scheme [of the EAHCA] in balancing the interests of the parties." (Appendix to Petition, p. 2a). Extending the significance of these concluding remarks without basis and beyond any principled construction, petitioner postulates that the Second Circuit adopted a novel and impermissible "balancing" test. Petitioner then argues that review by this Court is necessary to resolve an "apparent conflict"[5] between the Second Circuit's analysis in this case and the so-called "bright-line" test[6] enunciated by the United States Court of Appeals for the Ninth Circuit in *Department of Education v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983). Petitioner contends that the Ninth Circuit's inflexible "bright-line" test requires school districts to provide handicapped children with therapeutic medical treatment unless that treatment is provided by a physician.

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[5] Unwilling to test the limits of incredulity by alleging an "actual" conflict between the decisions of the Second and Ninth Circuits, petitioner suggests that review by this Court nevertheless is warranted to review an "apparent" conflict between those decisions. Any conflict between these decisions is apparent only to petitioner and premised upon a distorted interpretation of these cases.

[6] The phrase "bright-line" test is petitioner's own and will not be found in the Ninth Circuit's opinion in *Katherine D.* Petitioner's facile attempt to mold the decisions of the Second and Ninth Circuits into a position of conflict belies the existence of any real conflict deserving of this Court's attention. This so-called "bright-line" test is illogically rigid and seriously flawed. For example, even CIC would not be a related service under this test if administered by a physician.

Preliminarily, it is clear from the decisions of this Court and the decisions of the federal courts of appeals that the precise contours of a "free appropriate public education" must be determined on a case-by-case basis by considering all of the pertinent facts and circumstances. Indeed, this Court has held that the duty to provide a "free appropriate public education" is so complex that satisfaction of that duty cannot be measured by any litmus test or formula. *Board of Education v. Rowley,* 458 U.S. at 199-200. In rejecting the notion that the EAHCA requires participating school districts to provide handicapped children with opportunities and services equal to those offered nonhandicapped children, this Court has observed:

> The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. . . . The theme of the [EAHCA] is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.

Rowley, 458 U.S. at 199-200. Thus, a "balancing of the interests of the parties" is clearly contemplated when preparing an individualized program of instruction for a handicapped child that will afford that child a "free appropriate public education."

Certainly *Katherine D.* does not stand for anything to the contrary. The Ninth Circuit did not adopt a "bright-line" test in *Katherine D.* to determine the level of medical treatment which must be afforded handicapped children as part of a "free appropriate public education." In that case, a handicapped child, suffering from cystic fibrosis and tracheaomalacia, wore a tracheostomy tube which allowed her to breath and expel mucous secretions from her lungs. 727 F.2d at 812. The child's physical condition required that her lungs be suctioned just two or three times a day and that her tracheostomy tube be replaced should it become dislodged. *Id.* In significant contrast to the care which petitioner demands, the care which Katherine D. needed could be performed intermittently by a trained layperson (*i.e.*, her teachers). *Id.* The Ninth Circuit therefore determined that these were "related services" which the school district was obligated to provide under the EAHCA. *Id.* at 815.

In reaching this conclusion, the Ninth Circuit reiterated this Court's admonition that Congress did not intend a broad interpretation of the term "free appropriate public education" that would require school districts to maximize each handicapped child's potential. *Katherine D.*, 727 F.2d at 813 (*citing Board of Education v. Rowley,* 458 U.S. at 198). The Ninth Circuit observed:

> Noticeably absent from the [EAHCA] is any requirement that [participating states] provide the best possible education for the eligible handicapped child. Because budgetary constraints limit resources that realistically can be committed to these special programs the [state] is required to make only those efforts to accommodate Katherine's needs that are "within reason."

Katherine D., 727 F.2d at 813. *See also Tokarcik v. Forest Hills School District,* 665 F.2d 443, 455 (3d Cir. 1981), *cert. denied,* 458 U.S. 1121 (1982) (related services include what is required

"within reason" to make a regular classroom setting possible for a handicapped child who can benefit from it). With these principles in mind and after considering the nature and extent of the care at issue, the Ninth Circuit decided that Katherine D.'s uncomplicated physical needs could reasonably be accommodated in a regular classroom "without unduly burdening the school system" and that the school district was obligated to provide that care under the EAHCA. *Katherine D.*, 727 F.2d at 815.

Petitioner's contention that the Ninth Circuit adopted a "bright-line" test in *Katherine D.* which requires school districts to provide handicapped children with skilled nursing services and medical care subject only to the limitation that this care not be administered by a physician is simply not true. While the Ninth Circuit recognized that the regulations of the United States Department of Education[7] exclude "services provided by a licensed physician" from the definition of "related services," this clearly was not the determinative factor in its opinion. Indeed, if the Ninth Circuit had intended to enunciate a "bright-line" test as petitioner contends, it could and would have issued an abbreviated decision to that affect without examining the complexity and extent of the medical care which that handicapped child required.

The different results which the Second Circuit reached in this case and the Ninth Circuit reached in *Katherine D.* are attributable to the compelling differences between the medical attention which the students required and not to any doctrinal differences in the legal analysis which the courts applied. Petitioner's handicaps are far more severe and her medical needs commensurately more complicated than those faced by Katherine D. Thus, the "apparent conflict" which petitioner perceives between the decisions of these courts is illusory and need not be addressed by this Court.

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[7] 34 C.F.R. §300.13.

CONCLUSION

For the above reasons, respondents respectfully pray that the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit be denied.

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